In the Court of Appeal of Alberta

Citation: Atco Gas and Pipelines Ltd v Alberta (Utilities Commission), 2014 ABCA 28

Date: 20140120
Docket: 1201-0090-AC
Registry: Calgary

Between:

Atco Gas and Pipelines Ltd.

Appellant

- and -

Alberta Utilities Commission and Office of the Utilities Consumer Advocate

Respondents

The Court:

The Honourable Madam Justice Carole Conrad
The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Peter Martin

Reasons for Judgment Reserved
of The Honourable Madam Justice Conrad
Concurred in by The Honourable Mr. Justice Martin

Concurring Reasons for Judgment
of The Honourable Mr. Justice Berger

Appeal from the Decision by
Alberta Utilities Commission
Dated the 16th day of March, 2012
(Decision 2012-068)

Reasons for Judgment Reserved
of the Honourable Madam Justice Conrad

Introduction

[1] The appellant, Atco Gas and Pipelines Ltd. [Atco] appeals from a decision of the Alberta Utilities Commission [Commission], Decision 2012-068, removing certain assets related to Atco's salt cavern storage facilities from the rate base effective July 2009. The decision arose from Atco's application to dispose of certain assets it had determined were no longer used or required in the operations of the utility.

Issues

[2] Leave to appeal was granted on two grounds:

i. Did the Commission err in setting an effective date for removal of the Salt Cavern Excess Assets from the rate base at July 1, 2009?

ii. Did the Commission err by requiring Atco to bear the costs and burdens attributed to non-utility use of portions of a single, indivisible asset originally acquired for the purposes of the utility?

Decision

[3] The appeal is dismissed.

Issue one:

[4] The Commission did not err in law by making its decision to remove assets from the rate base effective July 1, 2009; nor was its decision unreasonable.

Issue two:

[5] This issue deals with the removal of a portion of an asset from the rate base where that portion is no longer required for utility purposes. There is little authority on this issue and every case will have to be dealt with on its circumstances.

[6] Depending on the specific facts and circumstances, the decision to remove a portion of an asset from the rate base and the method of doing so may raise many considerations including such matters as: whether the asset can be physically, practically or legally divided; ease of division; associated costs involved and who should pay them; length of time the asset has been in the rate base; whether the divided portion has other potential uses; and generally whether

exclusion of a portion of an asset from the rate base is just and reasonable in all the circumstances.

[7] Here it was common ground that the eastern portion of the quarter section currently in the rate base was no longer required for operational purposes. The Commission determined to remove value for that portion from the rate base and the land was then available for Atco's separate use. The Commission also consented to future disposition in the event the utility eventually determined a sale was desirable on the understanding that the utility pay any associated costs of subdivision.

[8] The standard of review is one of reasonableness and in all the circumstances of this case, I cannot say that the decision is unreasonable.

Background

[9] Atco Gas and Pipelines Ltd is a gas utility within the meaning of the *Gas Utilities Act*, RSA 2000, c G-5, regulated by the Commission pursuant to that Act, the *Gas Utilities Designation Regulation*, AR 257/2007, the *Public Utilities Act*, RSA 2000, c P-45, and the *Alberta Utilities Commission Act*, SA 2007, c A-37.2. The Commission regulates the rates and tariffs of the two divisions of Atco Gas and Pipelines Ltd, namely, Atco Gas which operates the gas distribution utility and Atco Pipelines which operates a natural gas transmission utility. This appeal arises from an application of Atco Gas division. The Commission determines revenue requirements and utility rate base, and sets rates pursuant to sections 36 and 37 of the *Gas Utilities Act*.

[10] Under section 26(2)(d) of the *Gas Utilities Act*, a disposition of an asset by Atco outside the ordinary course of business requires the prior consent of the Commission.

[11] Decision 2012-068, under appeal, arises from Atco's application pursuant to section 26(2)(d) for Commission approval of the disposition of certain salt cavern assets to an affiliated company. It was intended that the balance of the salt cavern assets were to remain in the rate base, revenue requirement and rates.

[12] The decision under appeal has a long procedural history. Atco originally acquired the salt caverns land in the early 1980s to store natural gas to meet peak winter demand periods. In 2007, Atco estimated 75 per cent of the salt cavern lands had no foreseeable regulated gas transmission use due to the existence of alternative, less costly means to store natural gas. The net book values for the lands and related pipeline assets were close to $4 million.

[13] Atco's efforts to dispose of certain portions of the salt caverns began on October 1, 2007, when it filed its 2008-2009 general rate application with the Commission (then the Alberta Energy and Utilities Board). That application proposed, effective December 31, 2007, to remove from the rate base and customer rates certain assets Atco described as the "Identified Salt Cavern Assets" on the basis the assets were no longer used or required to be used to provide utility

service. At that time, the Identified Salt Cavern Assets were larger in scope and size than the assets subsequently included in Atco's April 27, 2011 application giving rise to this appeal.

[14] On November 6, 2007, the Board ordered Atco to revise its general rate application and include the Identified Salt Cavern Assets in the general rate as the Board viewed the unilateral removal of the Identified Salt Cavern Assets from the rate base as a disposal under section 26(2)(d) of the *Gas Utilities Act*, requiring the Board's consent (Decision 2012-068 at para 22). Atco re-filed, and on February 1, 2008, Atco applied for approval to transfer the Identified Salt Cavern Assets to a non-utility affiliate. This proceeding was held in abeyance as the Commission had initiated an industry-wide inquiry to consider the impact of recent case law on utility asset dispositions.

[15] Atco wrote the Commission on July 21, 2008, stating that based on this court's decision in *Atco Gas and Pipelines Ltd v Alberta (Energy and Utilities Board)*, 2008 ABCA 200, 433 AR 183; leave to appeal refused, [2008] SCCA No 347 [the *Carbon* decision], Atco had decided not to sell the Identified Salt Cavern Assets. Atco again indicated it wanted to remove the Identified Salt Cavern Assets from the rate base, but Atco would maintain ownership of the assets.

[16] On July 30, 2008, the Commission replied and restated its position that an application under section 26(2)(d) was required to determine whether the assets could be removed from the rate base (Decision 2012-068 at para 29).

[17] Atco appealed the Commission's orders of November 6, 2007 and July 30, 2008 preventing Atco from removing the assets from the rate base. On June 30, 2009, this court held that ceasing use was not a disposition falling within section 26. Thus, a utility company that owns an asset included in the rate base calculations but no longer necessary for regulated utility business, could remove the asset from the rate base without obtaining consent from the Commission under section 26 of the *Gas Utilities Act*: *Atco Gas and Pipelines Ltd v Alberta (Utilities Commission)*, 2009 ABCA 246, 464 AR 275; leave to appeal refused, [2009] SCCA No 401 [the *Salt Caverns* decision]. In so deciding, this court held that section 26 did not apply to the ending of a use where no third party transfer or sale is contemplated because a "disposition" of the asset would not occur. That decision noted that no harm would be done because a removal from use would still be subject to the Commission's assessment of prudence. If the Commission found that removal was imprudent, it "could make some adjustment of values in rate base or in the expenses or return on investment, so that rates approved would not make the consumers pay rates based on that types of imprudence" (para 53).

[18] Subsequent to the *Salt Caverns* decision, by letter dated July 17, 2009, Atco requested the Commission to confirm that Identified Salt Cavern Assets could be removed from its negotiation discussions relating to its 2010-2012 revenue requirements. The restriction was removed by Decision 2009-111 on July 24, 2009 on several conditions including the provision of information to the Commission so it could determine the prudence of the removal.

[19] In Decision 2009-033, the Commission approved a negotiated settlement agreement with respect to Atco's 2008-2009 revenue requirements. This settlement agreement specifically precluded issues related to the Identified Salt Cavern Assets.

[20] In Decision 2010-228, the Commission approved a negotiated settlement agreement with respect to Atco's 2010-2012 revenue requirements. The Identified Salt Cavern Assets were assigned a placeholder status (reserving the issue of the salt cavern assets for future determination) to prevent unduly delaying the proceeding.

[21] On January 22, 2010, after several negotiated settlements failed to decide the fate of the Identified Salt Cavern Assets, the Commission approved Atco's request to deal with the salt cavern assets in a separate proceeding. Those proceedings gave rise to Decision 2012-068 -- the decision now under appeal.

Decision 2012-068

[22] The Commission found that the proposed disposition of surplus assets did not offend the "no-harm test" traditionally employed by it and its predecessors as rates and services would not be adversely impacted. It determined, however, that the portion of the salt cavern assets no longer "used or required to be used to provide utility service" under section 37 of the *Gas Utilities Act* was broader than the Surplus Assets listed in Atco's April 2011 application.

[23] As a result, the Commission directed Atco to remove from the rate base and revenue requirements the "Surplus Assets" (SW 34-55-21-W4M quarter section, a disposal well on that land and a water system transporting water from the North Saskatchewan River) and the "Additional Assets" (the eastern half of SE 34-55-21-W4M quarter section and the well located on the land). The decision also ordered the "Related Assets" (water infrastructure, brine disposal infrastructure and control fluid infrastructure) be removed from the rate base and revenue requirements. Collectively, the assets ordered to be removed were referred to as the "Salt Cavern Excess Assets".

[24] The Commission also directed that if Atco wished to dispose of the Related Assets and the Additional Assets, including subdivision of the SE 34-55-21-W4M in the Additional Assets, the Commission approved such disposition, with all costs, including subdivision to be borne by Atco's shareholders.

[25] The Commission backdated the effective date of the removal of the assets to July 1, 2009, the day following issuance of the *Salt Caverns* decision, on the basis that Atco knew at that time that it did not require the Commission's consent to remove the assets from the rate base.

Standard of Review

[26] As a specialized and expert tribunal charged with the administration of a comprehensive set of legislation regulating all aspects of the energy industry in the Province of Alberta, decisions of the Commission are entitled to a high degree of curial deference. Decisions

requiring the interpretation of its governing statutes and regulations, and the application of its experience and expertise, will be measured on a standard of reasonableness: *Coalition of Citizens Impacted by the Caroline Shell Plant v Alberta (Energy and Utilities Board)* (1996), 187 AR 205 at para 14 (CA).

[27] There is no true jurisdictional issue and there was no breach of the rule against impermissible retroactive rate making.

[28] I am satisfied that the standard of review for the two issues on this appeal is one of reasonableness.

Issue 1: Did the Commission err in setting an effective date for removal of the Salt Cavern Excess Assets from the rate base at July 1, 2009?

[29] A regulatory authority fixes just and reasonable rates pursuant to sections 36 and 37(1) of the Act which reads as follows:

> 36 The Commission, on its own initiative or on the application of a person having an interest, may by order in writing, which is to be made after giving notice to and hearing the parties interested,
>
> > (a) fix just and reasonable individual rates, joint rates, tolls or charges or schedules of them, as well as commutation and other special rates, which shall be imposed, observed and followed afterwards by the owner of the gas utility,
> >
> > (b) fix proper and adequate rates and methods of depreciation, amortization or depletion in respect of the property of any owner of a gas utility, who shall make the owner's depreciation, amortization or depletion accounts conform to the rates and methods fixed by the Commission,
> >
> > (c) fix just and reasonable standards, classifications, regulations, practices, measurements or service, which shall be furnished, imposed, observed and followed thereafter by the owner of the gas utility,
> >
> > (d) require an owner of a gas utility to establish, construct, maintain and operate, but in compliance with this and any other Act relating to it, any reasonable extension of the owner's existing facilities when in the judgment of the Commission the extension is reasonable and practical and will furnish sufficient business to justify its construction and maintenance, and when the financial position of the owner of the gas utility reasonably warrants the original expenditure required in making and operating the extension, and

> (e) require an owner of a gas utility to supply and deliver gas to the persons, for the purposes, at the rates, prices and charges and on the terms and conditions that the Commission directs, fixes or imposes.
>
> 37(1) In fixing just and reasonable rates, tolls or charges, or schedules of them, to be imposed, observed and followed afterwards by an owner of a gas utility, the Commission shall determine a rate base for the property of the owner of the gas utility used or required to be used to provide service to the public within Alberta and on determining a rate base it shall fix a fair return on the rate base.

[30] As set out in *Salt Caverns* at para 20, a regulatory authority looks at two components when fixing just and reasonable rates, namely:

> (1) current expenses and taxes, and
>
> (2) an annual amount constituting a just and proper return on capital invested in the utility.

[31] As a result, the amount of capital invested and attributed which becomes part of the rate base is extremely important to both the consumers and the utility. This has led to considerable litigation over valuations of items and designation of assets appropriately within the rate base. At the end of the day, the Commission has the final say on whether an asset is included, or not included, in the rate base. See: *Salt Caverns* at para 22; *Alberta Power v Alberta (Public Utilities Board)* (1990), 102 AR 353 (CA).

[32] Arguments on appeal centered on this court's recent decisions in *Carbon* and *Salt Caverns*. *Carbon* dealt with issues arising from a gas storage facility at Carbon, Alberta, where the facility started out as a producing gas field and was converted to a storage reservoir. Eventually the facility was no longer required for gas storage and issues surrounding removal from the rate base were raised on appeal to this court. The Board had concluded that the Carbon storage facility played no role in the appellant's gas distribution system and its only present contribution was to generate revenue that would reduce rates. The Board noted that ordinarily revenue generation on a stand-alone basis would likely not satisfy the use or required to use test for inclusion in the rate base. It found, however, that the Carbon storage facility was unique, due to its historical role as both an operational part of the system and as a source of revenue from leasing of surplus capacity. As a result of this historical uniqueness, the Board included the Carbon facility within the rate base, notwithstanding its only use was for revenue generation.

[33] This court found the Board's decision unreasonable. The court defined the question before the court as an "extricable question of law: whether revenue generation by the Carbon storage facility qualifies as a 'use' under the proper interpretation of the statute" (para 21). The court concluded that the phrase "used or intended to be used" to provide service are only those assets used in an operational sense and not merely used for revenue generation or accounting for the revenue.

[34] *Carbon* found at para 29 that the concept of assets becoming "dedicated to service" and so remaining in the rate base forever is inconsistent with the decision in *Atco Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para 69, [2006] 1 SCR 140 [the *Stores Block* decision] and would fetter the Board's discretion to deal with changing circumstances. In *Stores Block*, the Supreme Court of Canada found that regulation of the gas utility does not give the end customers an ownership interest in the assets of the utility.

[35] At para 30 in *Carbon*, this court held:

> The end customers are entitled to service, not assets. The service that they are entitled to is the delivery of gas on reasonable and just terms, not revenue generation. Just as the end customers have no ownership interest in the assets of the utility, they have no interest in the profits, unregulated revenues, or unregulated businesses of the utility. The value of economic assets is often largely determined by the revenues they can generate, and if the end customers are not entitled to any ownership interest in the assets, they are likewise not entitled to any interest in the cash flow generated by those assets: *Store Block* at para 78. The end customers are entitled to receive gas delivery services from the utility, not revenue-generating services or gas rate subsidization.

[36] In *Carbon*, no operational use existed, and the court found that mere revenue generation, or accounting for revenue, was not a service. As a result, the Board's decision to include the Carbon facilities in the rate base was found to be unreasonable.

[37] In *Salt Caverns*, this court paraphrased from the *Carbon* decision at para 14:

> In any event, to the extent to which the answers to the legal issues raised in the first and second questions on which leave was granted are not premature, they are largely resolved by this court's recent decision in "*Carbon*" where the Court held that that the Board had no jurisdiction to include in rate base, assets which were not being used or required to be used in providing service to the public, in an operational context. Past or historical use of assets does not permit their inclusion in rate base unless they continue to be used in the system.

[38] As a result of that language, the Commission and the respondent Utilities Consumer Advocate [UCA] argue that if there is no jurisdiction to include assets not being used in the utility operations, then prior orders that included such assets are a nullity. In my view, the court in *Salt Caverns* was not intending to expand upon the *Carbon* decision by use of the word jurisdiction, but was merely summarizing *Carbon* in a general way. I do not read *Carbon* as suggesting that this is a jurisdictional issue such that past orders of the Board which included assets of no operational use were a nullity. Rather, the court found accounting for revenue and revenue generation standing alone are not part of the utility service, and that they should not be included in the rate base.

[39] The decision in *Salt Caverns* is important here. In that case, the court addressed the question of whether unilateral withdrawal of assets from utility service and the rate base was a "disposition" under section 26(2)(d), requiring commission approval. The court concluded that the scope of the language of section 26(2)(d) referred to giving up ownership, in whole or in part. It found that the words do not refer to starting or stopping a particular use, acquiring or losing a need, or to objects becoming useful or useless. In the end, the court found that the language did not apply to ending a use. Interestingly, in arriving at this decision the court stated at paras 51-53:

> So I interpret the words of s. 26 as not applying to ending a use. If that produced an absurd result, or crippled the Commission's power to regulate rates, then one might have to look harder at s. 26 and even try to stretch its words.
>
> But I see no *hiatus* here. It is common ground that as part of a normal rate hearing, the Commission can and must decide what items (property) are to be considered part of the rate base and given a value on which the utility company is entitled to recover a return on investment: s. 37 of the *Gas Utilities Act*. . . .
>
> Indeed, counsel for the appellant stressed to us what the Commission could do when hearing a rate application if it found want of due prudence in starting or stopping the use of some asset in the regulated utility. It could make some adjustment of values in the rate base or in the expenses or return on investment, so that rates approved would not make the consumers pay rates based on that type of imprudence.

[40] Determining usefulness will depend upon meeting the traditional criteria for what is, and what is not, in the rate base and does not involve a section 26 application because the property has not been disposed.

[41] These authorities indicate that, at least on a go forward basis, assets no longer used or required for use should not be included in the rate base, and the utility can unilaterally remove such assets from the rate base without the consent of the Commission. But, at the end of the day, the Commission will have the final say on whether property is, or is not, required for the use or future use of the utility as that falls squarely within its legislative mandate. In addition, a commission has the right to make whatever adjustments are necessary to compensate for imprudent removal of such assets in the interim.

[42] This reasoning was confirmed by McFadyen JA in *Calgary (City) v Alberta (Utilities Commission)*, 2010 ABCA 158, 487 AR 191. This was a leave to appeal application following the *Carbon* and the *Salt Caverns* decisions. In the *Calgary (City)* case, the Commission ordered assets removed from the rate base and adjustment to the rate base as of April 1, 2005, when the applicant had first indicated to the Commission that the asset was not used, or required to be used, in providing service to the public. The Commission backdated the removal of the asset from the rate base. In refusing to grant leave to appeal, McFadyen JA stated at para 23:

> Although the Commission may require that the utility prove that the asset is no longer being used in its operations, and that the cessation of use of the asset is not imprudent, absent proof of imprudence, **the adjustment date must be the date on which the utility, in fact, stopped using the asset, not the date on which the Commission agreed that the asset was no longer being used**. (Emphasis added.)

[43] Atco asserts that the effective date for removal of surplus assets should be within 30 days of the decision on its application, regardless of the closing date of the surplus assets transaction. It says Atco was penalized for complying with the Commission's earlier express directions, and for the uncertainty created by the Commission's refusal to communicate acceptance that the assets should be removed from the rate base. Although the Commission had been acting on a misapprehension of the law, Atco says that does not alter the fact its assets were effectively frozen.

[44] Atco says the facts in *Carbon* are distinguishable. In *Carbon*, the appropriate date for removal of assets was found to be the date management first determined the assets were not required for utility operations. In that case, however, the Commission authorized utilization of the assets for non-utility purpose pending determination of the issue. Thus, revenue was not lost in *Carbon*, whereas here, the Commission's directions resulted in no revenue from the non-utility assets. Atco argues that any date earlier than 30 days from the present decision without compensation yields an artificial, perverse result and is unreasonable.

[45] Atco also submits that the principle against retroactive ratemaking should be mechanically applied, and that backdating the removal of the salt cavern assets to July 1, 2009, without using a deferral account or interim rate, is a violation of the principle against retroactive ratemaking. It says the Commission erred in law.

[46] The respondent UCA takes a different position. It argues that the effective date for removal of the assets must be September 1, 2007, the date Atco first determined that the assets were no longer required for operational purposes. UCA argues once assets serve no utility purpose, there is no jurisdiction to retain them in the rate base and any decisions which included them are void. UCA says that since customers cannot share any revenues earned from assets with no valid operational purpose, nor share in any gain on the sale of such surplus assets, customers should not be forced to pay for assets once they are determined to be surplus. (See *Carbon* at para 30; *Stores Block* at para 69.) The UCA argues that it is irrelevant if the assets were earning income to Atco's benefit, or incurring costs to its account, during this time. Rather, the only issue is whether the assets were being used or required for operations of the utility. If not, they should be excluded, and there was no jurisdiction to include the assets in the rate base from September, 2007.

[47] The Commission was alive to and considered the arguments, and concluded that July 1, 2009 should be the effective date for removal of the Salt Cavern Excess Assets from utility service, rate base, revenue requirement and rates. Atco was directed to refund to customers all

amounts collected through rates associated with those assets from and after that date. In arriving at its decision, the Commission considered the facts, the submissions and the law.

[48] The Commission has broad, discretionary powers to set just and reasonable rates: *Gas Utilities Act*, sections 36 and 37. The Commission is required to balance the interests of the public while acting in a fair manner towards the utility. This regulatory compact between the Commission and Atco is well known:

> Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their determined territories, and are required to have their rates and certain operations regulated.
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> *Stores Block* at para 63

[49] Discussing the statutory requirement to set just and reasonable rates, the Supreme Court of Canada noted:

> Rate regulation serves several aims — sustainability, equity and efficiency — which underlie the reasoning as to how rates are fixed:
>
> > . . . the regulated company must be able to finance its operations, and any required investment, so that it can continue to operate in the future . . . Equity is related to the distribution of welfare among members of society. The objective of sustainability already implies that shareholders should not receive "too low" a return (and defines this in terms of the reward necessary to ensure continued investment in the utility), while equity implies that their returns should not be "too high". (R Green and M Rodriguez Pardina, *Resetting Price Controls for Privatized Utilities: A Manual for Regulators* (1999), at 5)
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> *Stores Block* at para 62

[50] Fairness to customers requires that the rate base include only assets used or to be used for operation of the utility and not assets with no production value. At the same time, the Commission has an obligation of fairness to the utility. The Commission recognized the effect of its directions to Atco when it selected a July 1, 2009 implementation date.

[51] I do not accept Atco's submission that the Commission erred in law by engaging in prohibited retroactive ratemaking. Whether a decision is impermissible retroactive ratemaking is an issue of fact. (See *Atco Gas, Re*, 2010 ABCA 132, 477 AR 1, discussed below.) There are two fundamental policy concerns behind retroactive ratemaking. With regard to the utility, retroactive ratemaking is unfair because a utility relies on certain rates to make business

decisions. To change them after the fact could cause unexpected results for the utility: Yvonne Penning, "Can Economic Policy and Legal Formalism Be Reconciled: The 1986 Bell Rate Case" (1989) 47 *U Toronto Fac L Rev* 607 at 610. With regard to consumers, retroactive ratemaking redistributes the cost of utility service by asking today's customers to pay for expenses incurred by yesterday's customers: "Can Economic Policy and Legal Formalism Be Reconciled" at 610. Clearly, that should be avoided.

[52] In this case, removing the salt cavern assets from the rate base or revenue requirement would cause a decrease in rates and a benefit for customers, not an increase after the fact. Thus, retroactivity to July 1, 2009 works in favour of customers from that date forward. The question here involves the question of fairness to the utility.

[53] Where a utility has knowledge that assets are not required for operational purposes, and knows it can unilaterally remove them, the utility must also be taken to know that the rates will be subject to change as a result of the non-inclusion of those assets in the rate base. It has the choice to remove the assets and utilize them in other revenue generating operations. Once there is knowledge, the harm of retroactive ratemaking from the utility's perspective vanishes.

[54] Retroactive ratemaking was considered by this court in *Calgary (City) v Alberta (Energy and Utilities Board)*, 2010 ABCA 132, 477 AR 1 at paras 46-47 [*Deferred Gas Accounts* decision], where it confirmed the problems surrounding retroactive ratemaking by a regulatory authority:

> Generally, ratemaking and rates must be prospective: *Coseka Resources Ltd v Saratoga Processing Co* (1980), 31 A.R. 541 at para. 29, 16 Alta. L.R. (2d) 60 (C.A.). A utility's past financial results can be used to forecast future expenses, but a regulator cannot design future rates to recover past revenue deficiencies: *Northwestern Utilities Ltd., Re* (1978), [1979] 1 SCR 684 at 691 and 699 [*Northwestern Utilities*].
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> Retroactive ratemaking "establish[es] rates to replace or be substituted to those which were charged during that period": *Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission)*, [1989] 1 SCR 1722 at 1749. Utility regulators cannot retroactively change rates because it creates a lack of certainty for utility consumers. If a regulator could retroactively change rates, consumers would never be assured of the finality of rates they paid for utility services.

[55] The *Deferred Gas Accounts* decision of this court, following *Stores Block*, set down guiding principles for determining whether ratemaking was impermissibly retroactive.

[56] Simply because a ratemaking decision has an impact on a past rate does not mean it is an impermissible retroactive decision. The critical factor for determining whether the regulator is engaging in retroactive ratemaking is the parties' knowledge. Hunt JA stated at para 57:

> Both *Bell Canada 1989* [*Bell Canada v Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 SCR 1722] and *Bell Aliant* [*Bell Canada v Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 SCR 764] (which concerned deferral accounts rather than interim rates) illustrate the same preoccupation: **were the affected parties aware that the rates were subject to change?** If so, the concerns about predictability and unfairness that underlie the prohibitions against retroactive and retrospective ratemaking become less significant. (Emphasis added.)

[57] If a utility is aware that a rate is interim and subject to change, then a regulator's revision of the rate will not be disallowed for impermissible retroactive ratemaking. This was the conclusion reached by the Supreme Court of Canada in *Bell Canada v Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 SCR 1722, 60 DLR (4th) 682 [*Bell Canada 1989*].

[58] According to the Supreme Court of Canada in *Bell Canada 1989* at 1756, alteration of an interim rate by a regulator is simply a function of regulators who have the mandate to ensure rates and tariffs are, at all times, just and reasonable.

[59] In this appeal, the Commission expressly reserved the issue of the salt cavern assets, among others, from the revenue requirement determination: Commission's Decisions 2009-033 and 2010-228. Atco says the use of a placeholder (reserving the issue of the salt cavern assets for future determination) was not enough to enable the Commission to revisit the matter in subsequent years. Atco submits that the terms "interim rate order" and "deferral account" are well understood by all parties and that the use of the word "placeholder", without more, is not enough to achieve the same purpose as interim rates and deferral accounts. I do not agree. Atco had all the information it required by June 2009 to know that it was not entitled to revenue from inclusion of those assets in the rate base.

[60] In 2009 and 2010, as permitted under the *Gas Utilities Act*, Atco engaged in negotiation of issues related to the salt cavern assets and revenue requirements. The resulting Negotiated Settlements in 2009 and 2010 expressly reserved making a decision about removing the salt cavern assets from the revenue requirement because the parties were addressing the matters in separate proceedings. The Negotiated Settlements (found in the Commission's Decision 2009-033 and Decision 2010-228) set Atco's revenue requirement for 2009 and 2010. Atco knew that the Negotiated Settlements only represented a partial rate, subject to the determination of the proceedings relating to the salt cavern assets. This is apparent when in 2010 the parties to the Negotiated Settlements agreed to not delay the rate setting proceedings for the sake of determining the fate of the salt cavern assets:

> In a letter dated January 22, 2010, the Commission agreed with all parties that the present proceeding should not be delayed as a result of any issues regarding the Identified Salt Cavern Assets. The Commission granted [Atco's] request to deal with the Identified Salt Cavern Assets in a separate, subsequent proceeding. Given that the removal of Identified

> Salt Cavern Assets would constitute a change to revenue requirement which would ultimately be reflected in a change to rates, the Commission considered that any such Identified Salt Cavern Assets proceeding would be a rate-setting proceeding.
>
> Decision 2010-228 at para 26

[61] Not only did Atco agree to deal with the salt cavern assets in a separate proceeding, it was aware that the revenue requirement would change as a result of removal of the assets. Although there was no discussion about interim rates or deferral accounts, Atco had knowledge that the impact of the subsequent proceeding could result in a different revenue requirement. It not only can be taken to have known that it could remove the assets from the rate base, but the reservation of the issue of the salt cavern assets for a future proceeding certainly supports the Commission's finding here.

[62] Slavish adherence to the use of interim rates and deferral accounts should not prohibit adjustments in a case such as this. Regulators have a broad, discretionary authority when ratemaking. The relevant question here is whether the utility knew from the actions or words of the regulator that the rates were subject to change. Atco clearly knew since 2007 that the identified salt cavern assets were not being used or required for operations of the utility. Atco's submission that a commission can only change rates if it used an interim rate or deferral account misapprehends the reason why deferral accounts and interim rates can be retrospectively altered by a regulator. The question here is not whether the regulator used the name "deferral accounts" or "interim rates" but whether Atco was aware that the rate could be altered retroactively.

[63] The Commission recognized the problem it had created by refusing to allow removal of excess salt cavern assets and therefore elected not to set the date before July 1, 2009. It awarded Atco compensation on a *quantum meruit* basis for the period January 1, 2008 to June 2009. But by July 1, 2009, Atco not only knew the excess assets were not required for operations, it was aware it could unilaterally remove them. It could, at that time, have withdrawn the assets and utilized them prudently in any manner short of disposition as defined under section 26. As a result, it was Atco's decision to freeze the use of the assets by not unilaterally withdrawing them once *Salt Caverns* issued. It should have recognized that rates would change.

[64] I reject the UCA's argument that it was a jurisdictional error not to order an implementation date of September 2007, when Atco first indicated the assets were no longer used or would be used for utilities services. Moreover, given the history of this matter, the uncertainty of the law, and the Commission's acceptance of its role in directing the assets not be removed, the Commission's choice of a later date is reasonable. The Commission was exercising its broad, discretionary power to set just and reasonable rates when it selected the implementation date as it is entitled to do.

[65] In summary:

1. Assets not being used or required to be used for utility service are not to be included in the rate base; and

2. a utility has the responsibility to withdraw assets from the rate base once the assets are no longer used or required to be, and no Commission approval is required. Such removal is, of course, subject to a prudency review by the Commission.

This decision falls squarely within the Commission's mandate, it is not unreasonable and is owed deference by this court. The appellant has failed to show that the Commission erred in law or acted unreasonably in exercising its discretionary power, and this ground of appeal must be dismissed.

Issue 2: Did the Commission err by requiring Atco to bear the costs and burdens attributed to non-utility use of portions of a single, indivisible asset originally acquired for the purposes of the utility?

[66] The Commission included the eastern portion of the undivided SE quarter of section 34, township 55, range 21-W4M in the assets found no longer used or required for providing utility service (the Additional Assets) and excluded them from the rate base. The Commission held that since no more salt caverns are to be developed, and the water pipeline is not necessary to maintain the existing caverns, then the Additional Assets should also be removed from the rate base. It is common ground that these assets are not required for operations, but Atco argues this quarter section is an undivided asset that should not be notionally divided for rate base purposes. The Commission rejected that argument and held that customers should not be burdened by the costs attributed to the unused portion of the land and well just because Atco chooses not to subdivide or use the land in some other manner.

[67] The Commission held that subdivision of this quarter section is not required to remove part of the asset from the rate base, finding it could remove a proportional amount of the book value of the land and non-depreciable assets. It stated at para 100:

> [Atco] is free then to make whatever use of the Additional Assets and Related Assets it may wish to for its own purposes. Given that it is not necessary to subdivide the property to remove the value of the Additional Assets and the Related Assets from rate base and revenue requirement, the cost of any subdivision of the property which [Atco] may wish to pursue for its own purposes or to dispose of the property should be for the account of [Atco] shareholders.

Both the Additional Assets and unused infrastructure (the Related Assets) were to be removed from the rate base. In addition, the Commission agreed that if Atco wished to proceed with a subdivision of the eastern portion of the quarter section and dispose of that land, the Commission consented to such a disposition under section 26(2)(d) of the *Gas Utilities Act*, on the basis that the costs of any subdivision would be borne by Atco.

[68] Atco says that the decision is unreasonable. It says that part of the asset is still required for the rate base, the asset has always been in the rate base, and the Commission cannot exclude a portion of an asset from the rate base without bearing the costs of such removal.

[69] The issue here is unique in that Atco does not want to proceed with subdivision due to costs of that subdivision. It involves the removal from the rate base of a portion only of a legally undivided asset, namely, a quarter section of land already in the rate base. The quarter section is an undivided parcel of land originally acquired in the 1980s for the purpose of establishing salt caverns on its western half and ensuring sufficient land for further salt caverns to the east, if and when required. Since then, other storage methods negate the need for future salt caverns. The existing salt caverns located on the westerly portion of the SE 34-55-21-W4M continue to have use for future utility service, but the eastern half of the quarter section and the well located on that land have no further use or expected use in operations.

[70] In its 2008-2009 General Rate Application and its earlier application, Atco had included the Additional Assets among those it sought to remove from the rate base, indicating that it wished to transfer the eastern portion of the quarter section to a non-utility affiliate, Atco Energy Solutions Ltd. This is notable as it is some evidence of an alternative use of this portion of land. By the 2011 application, the County of Strathcona had increased the development levy resulting in subdivision costs estimated at $1.2 million. As a result, Atco said that its affiliate no longer had any interest in acquiring the land.

[71] Atco takes the position that the quarter section is one indivisible asset acquired for utility purposes. As the asset is, and has historically been, used in operations and included in the rate base, it should remain there unless the cost of subdivision is borne by the ratepayers. Atco submits that the whole asset is properly in the rate base and the Commission cannot divide an undivided asset into portions for the purpose of excluding the value and costs associated with that portion from the rate base.

[72] At a minimum, Atco says that if the Commission wants to separate the value and costs associated with the eastern half from the rate base that should be accomplished by a legal subdivision of the property, which, if directed by the Commission, should be a cost recoverable from ratepayers as the utility would not voluntarily incur such a cost.

[73] I am satisfied that the Commission cannot order Atco to legally subdivide its quarter section of land. The authorities provide that an asset owned by a utility is the utility's private property. (See: *Stores Block*; *Salt Caverns*). While the Commission has the power under section 26 to block the sale of an asset in the rate base, it does not have the converse authority to interfere with property rights and order the sale of an asset. The Commission, therefore, cannot order the property be subdivided in order to treat the unused portion as no longer part of the rate base.

[74] In *Atco Gas and Pipelines Ltd v Alberta (Energy and Utilities Board)*, 2009 ABCA 171, 454 AR 176 [the *Harvest Hills* decision], this court considered the regulatory board's jurisdiction to appropriate proceeds of sale from lands not used nor required to be used to provide service. Relying on the *Stores Block* decision, this court held at para 29 there was no power to allocate proceeds from a sale or interfere with ownership rights where the asset is no longer needed to provide service to customers.

[75] Nonetheless, the Commission can make decisions about assets in the rate base. It is mandated to fix just and reasonable rates pursuant to section 36 of the *Act*. In so doing, section 37 grants the Commission jurisdiction to determine the rate base and decide what assets are used or required to be used in providing utility service as described by this court in *Salt Caverns* at paras 28 and 31:

> Can it be reasonably argued that this regulatory power is confined to ruling on adding new items to the rate base, but inapplicable to excluding old or unused items? No. Phillips, [*The Regulation of Public Utilities* (Public Utilities Reports, 1992)] at 302 quotes another established textbook and lists items which regulatory commissions may exclude from the rate base. They include obsolete property, property to be abandoned, overdeveloped property and facilities for future needs, and property used for non-utility purposes.
>
> . . .
>
> The paragraphs above show that the rate-regulation process allows and compels the Commission to decide what is in the rate base, i.e. what assets (still) are relevant utility investment on which the rates should give the company a return. The traditional test is whether they are used or required to be used, and (as will be seen below) nothing in the legislation changes that.

[76] The Commission is also required under section 37(2) to give due consideration to:

> (a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the gas utility, less depreciation, amortization or depletion in respect of each, and
>
> (b) to necessary working capital.

[77] Thus, the Supreme Court of Canada in *Stores Block* described the Board's responsibility as "maintaining a tariff that enhances the economic benefits to consumers and investors of the utility" (para 64). A commission must consider the symmetry of risk and return for both the utility and its customers. As stated by the majority in *Stores Block* at para 69:

> Assets are indeed considered in rate setting, as a factor, and utilities cannot sell an asset used in the service to create a profit and thereby restrict the quality or increase the price of service. Despite the consideration of utility assets in the rate-setting process, shareholders are the ones solely affected when the actual profits or losses of such a sale are realized; the utility absorbs losses and gains, increases and decreases in the value of assets, based on economic conditions and occasional unexpected technical difficulties, but continues to provide certainty in service both with regard to price and quality.

[78] In addition, the Commission has discretion to act in the public interest when customers would be harmed or face some risk of harm. As described by the majority in *Atco Ltd v Calgary Power Ltd*, [1982] 2 SCR 557 at 576:

> It is evident from the powers accorded to the Board by the legislature in both statutes mentioned above that the legislature has given the Board a mandate of the widest proportions to safeguard the public interest in the nature and quality of the service provided to the community by the public utilities. . . . This no doubt has a direct relationship with the rate-fixing function which ranks high in the authority and functions assigned to the Board.

[79] The Supreme Court of Canada in *Stores Block* held that while the Board could not allocate or appropriate sale proceeds, it had other options within its jurisdiction when a sale would affect the quality and/or quantity of the service offered by the utility or create additional operating costs for the future, such as not approving a sale. Additionally, the Board could attach conditions. The majority at para 77 suggested, "It could also require as a condition that the utility reinvest part of the sale proceeds back into the company in order to maintain a modern operating system that achieves the optimal growth of the system." But *Stores Block* also held that the ratepayers could not enjoy any of the profits of the sale, notwithstanding that through rates the ratepayers pay for or contribute to the acquisition of the asset.

[80] In *Harvest Hills*, this court (at para 34) was of the view that the Board may impose conditions where it had a valid concern to guard against land speculation.

[81] Similarly, in *Salt Caverns*, this court considered the possibility of a commission adjusting values of property in the rate base where it had a concern that the use or disuse of some asset lacked prudence. It stated at paras 52-53:

> It is common ground that as part of a normal rate hearing, the Commission can and must decide what items (property) are to be considered part of the rate base and given a value on which the utility company is entitled to recover a return on investment: s. 37 of the *Gas Utilities Act*. . . .
>
> Indeed, counsel for the appellant stressed to us what the Commission could do when hearing a rate application if it found want of due prudence in starting or stopping the use of some asset in the regulated utility. It could make some adjustment of values in the rate base or in the expenses or return on investment, so that rates approved would not make the consumers pay rates based on that type of imprudence.

[82] *Harvest Hills* focussed on the issue of disposition of land that had already been subdivided, so division was not contested. In this case, the Commission authorized a disposition under section 26(2)(d), but did not order the land divided. Rather, it removed the value it attributed to the eastern portion of the quarter section no longer required for utility service purposes. In doing so, it was determining the rate base including the property still in use for

utility service pursuant to section 37, as it is entitled to do. Atco was free to use that substantial portion of land as it saw fit. There was no evidence suggesting it had no alternative uses.

[83] The parties did not direct the court to any authority governing principles surrounding the removal of a portion of an asset from the rate base. In my view, those principles should be developed incrementally. While I recognize the general principle that assets which cease to have a utility purpose should be withdrawn from the rate base, the question still remains: "what is the asset?" Considerations for the Commission will vary with the facts and circumstance of the case, and in particular, the nature of the asset. Depending on the facts, the decision to remove a portion of an asset from the rate base may raise many considerations, including such matters as whether an asset can be physically, practically or legally divided; ease of division; associated costs involved and who should pay them; length of time the asset was in the rate base; whether the divided portion has other potential uses; whether separation of part of an asset sterilizes the remainder; and in general, what is just and reasonable in the circumstances. The list is neither definitive of factors to be considered, nor will every case require consideration of all criteria. The fact situation could vary from an easily divisible asset to a physical plant where the portion not required for operational use has no other functional purpose, yet costs associated with the unused and unneeded portion. Is an undivided plant two assets for the rate base purposes?

[84] In this case, the land had been in the rate base since 1982. As a result the utility had received a return on its investment for some time. The parties were in agreement that the eastern portion of this land and the well were not needed for the operations of the utility. Could it have other uses? The asset here is a tract of land. The Commission concluded that Atco was free to engage in other uses for the unused portion of land, if it chose not to sell. No evidence suggested that this land had no other use, short of subdivision and sale, nor that the eastern portion of the quarter section (some 80 acres) would be sterilized for other use so long as the western portion remained in the rate base. Indeed, Atco's earlier application for approval to remove for sale to a related company is evidence supporting a finding of other uses.

[85] Atco sought, at a minimum, that the subdivision costs be borne by the ratepayers but the Commission was not prepared to place that burden on the ratepayers. It authorized other uses, obviously concluding that subdivision was unnecessary for all uses.

[86] Since the authorities have established that ratepayers cannot share in any of the sales of assets, it follows that holding property within the rate base, once its use has expired, works to the detriment of the ratepayer. The recent principles set down in *Stores Block* and *Carbon* make it clear that ratepayers have no opportunity to share in the better times when land values rise, so it is important to protect the ratepayer by ensuring only proper assets remain in the rate base. In judging reasonableness, it is important to remember that since ratepayers cannot share in sale proceeds of utility assets, their protection for fair treatment lies in excluding assets not required for utility operations from the rate base.

[87] Other choices for dealing with this quarter section might have been selected by the Commission. For example, perhaps the Commission could have elected to keep the whole asset

in the rate base and ensure prudent non-utility use of the eastern half and share in that revenue because the asset remains in the rate base. While the authorities suggest that an asset cannot be kept in the rate base for the purpose of earning non-utility revenue, those cases were dealing with assets no longer required for utility purposes. I do not read the authorities as denying flexibility where a portion of an asset is required for utility operations and removal of the balance of the asset is not just or reasonable. I do not need to make that decision here in view of the Commission's decision to remove value of the eastern half from the rate base.

[88] The Commission obviously considered the eastern portion and the balance of the quarter section as two assets for rate purposes. That decision is a reasonable one on the facts of this case.

[89] In summary:

1. Fair treatment for ratepayers requires exclusion of assets not required for utility operations from the rate base.

2. The standard of review of a commission's decision to remove an asset from the rate base is one of reasonableness.

3. The Commission's decision to treat the quarter section of land as two assets for the rate base purposes and direct the utility to remove the costs of the non-utility use portion from the accounting determination of the rate base and revenue requirement was not unreasonable on the facts and circumstances here, and I see no basis for appellate intervention.

Conclusion

[90] The appeal is dismissed.

Appeal heard on June 11, 2013

Reasons filed at Calgary, Alberta
this 20th day of January, 2014

Conrad J.A.

I concur:

Martin J.A.

Concurring Reasons for Judgment of
The Honourable Mr. Justice Berger

[91] I have had the advantage of reading in draft form the Reasons for Judgment Reserved of Conrad J.A. of November 22, 2013.

[92] Application of the principles that emerge from the reported cases cited by counsel support dismissal of the appeal. They are the following:

1) Section 37 of the ***Gas Utilities Act***, RSA 2000, G-5 requires an asset to have an operational purpose in providing utility services to be included within the rate base. The cost of assets without an operational purpose in providing service to the public cannot be included in the rate base and in customer rates.

2) Section 26 of the ***Gas Utilities Act*** does not require the consent of the Commission prior to a utility removing an asset from the rate base.

3) It follows that a utility may, without obtaining prior Commission approval, remove an asset from the rate base at the time that the utility management considers that the asset is no longer used or required to be used, or will soon become no longer used or required to be used, in an operational sense to provide regulated utility services.

4) The Commission has no jurisdiction to include in the rate base assets which are not being used or required to be used in providing service to the public in an operational context: ***Atco Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)***, 2008 ABCA 200, 433 A.R. 183 (the "***Carbon*** decision"); ***Atco Gas and Pipelines Ltd. v. Alberta (Utilities Commission)***, 2009 ABCA 246, 464 A.R. 275 (the "***Salt Caverns*** decision"). See also the comments of McFadyen J.A. in ***Calgary (City) v. Alberta (Utilities Commission)***, 2010 ABCA 158, 487 A.R. 191.

   [I appreciate full well that my colleague takes a different view with respect to the use of the term "jurisdiction" in this context. With great respect, I prefer the commentary of Jones and Villars, *Principles of Administrative Law*, 5th ed. (Edmonton: Carswell, 2009) at p. 149 on the issue of when a decision is *ultra vires* and void:

> "The question sometimes arises whether an *ultra vires* act is void or merely voidable. The answer is important in order to determine whether the delegate's action has any legal effect prior to the declaration by the court that it is *ultra vires*. In principle, all *ultra vires* administrative actions are void, not voidable, and there are not degrees of invalidity ... Although people may have acted on the assumption that the delegate did have authority to do the impugned action, the effect of the court's granting of judicial review must be to declare that that was an erroneous state of affairs, that the delegate never has jurisdiction to do the particular action in the manner complained of." (footnotes omitted)

After all, review by this Court is confined to errors of law or jurisdiction thereby limiting the Court to a determination as to whether actions of the inferior tribunal are void.]

5) When the assets cease to have a utility purpose, the utility is obliged to withdraw the assets from regulated service without first obtaining Commission approval.

6) The Commission has no jurisdiction over non-utility assets that are located within a single indivisible quarter-section of land originally acquired for the purposes of the utility when it would not have such jurisdiction if the non-utility assets were physically separated from utility assets.

7) It is not open to the Commission to compel the utility to physically sub-divide a quarter-section in order for the Commission to determine that customers should not be obligated to pay for non-utility assets located within that quarter-section.

8) When assets no longer have an "operational purpose" within the meaning of paras. 25 and 27 of the ***Carbon*** decision and paras. 14 and 56 of the ***Salt Caverns*** decision, it is open to the Commission to direct the utility to remove the cost of the additional assets and the related assets from the regulatory accounting determination of rate base, revenue requirement and customer rates.

9) It is the utility and its shareholders that must bear the burden of any losses on disposition of an asset and any decrease in value in property originally acquired by the utility to provide utility service. (See para. 69 of ***Atco Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)***, [2006] 1 S.C.R. 140). In other words, the cost of any sub-division of the property or

> its disposition is for the account of the utility's shareholders. (My colleague would afford the Commission some latitude. Given the statutory framework, I would not. The utility alone absorbs losses and gains).

[93] In concurring in the result, I find it unnecessary to comment further on the fulsome reasons of my colleague.

Appeal heard on June 11, 2013

Reasons filed at Calgary, Alberta
this 20th day of January, 2014

Berger J.A.

Appearances:

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